

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT IN AND FOR
UTAH COUNTY, STATE OF UTAH.

PROVO RESERVOIR COMPANY, a
corporation,

Plaintiff,

-vs-

PROVO CITY, et al., T. F.
WENTZ,

Defendants.

No. 2888 CIVIL

AMENDED PETITION OF PROVO
RESERVOIR WATER USERS COMPANY

The amended petition of Provo Reservoir Water Users Company respectfully represents to the above entitled Court, as follows:-

1. That petitioner is a mutual water users corporation, organized and existing under and by virtue of the laws of the State of Utah.

2. That T. F. Wentz is now and has been for many years past the duly appointed, qualified and acting water commissioner appointed by this Court in the above entitled cause for the purpose of carrying out the provisions of the Decree entered in the above entitled matter.

3. That Provo Reservoir Company, a corporation of the State of Utah, is the plaintiff in the above entitled action, and that your petitioner herein is the successor in interest to said plaintiff of certain water rights known as stored waters, and waters transferred and brought from the Weber River water shed to the Provo River Water System, as is more specifically defined and set forth in said Decree, which said waters were awarded to plaintiff by said decree.

4. That the stored waters to which the petitioner is successor in interest of said plaintiff are more specifically set forth in said decree under the general divisions of Classes "B", paragraph 38, and "F", paragraph 42, which divisions and paragraphs are hereby referred to and made a part of this petition.

5. That said storage rights are based on water applications in the State Engineer's office as described and numbered in said paragraphs 38 and 42 of said decree; that said applications provide for the impounding and storage of flood waters of said Provo River at the head of said River, and the releasing of the waters so stored during

the irrigation seasons of each year, into the said Provo River and the comingling of said waters with the natural flow of the river, and through the channel of said river to a point thereon known as Heiselt's dam near the mouth of Provo Canyon where said waters are to be diverted into petitioner's canal, a distance of about 70 miles from the place of storage.

That paragraph 120 of the final Decree entered in the above entitled cause provides as follows:-

"It is further ordered, adjudged and decreed that the plaintiff and the defendants having the right to stored water in their several reservoirs as hereinbefore stated, have the right to release said waters in the quantities and at such times as they may elect, and comingle the same with the waters of Provo River and then be taken out, less the losses by evaporation and seepage."

That said decree further provides in paragraph 117 as follows, to-wit:-

"It is further ordered, adjudged and decreed, that the storage waters, the Ontario Drain Tunnel waters, and the waters diverted from the Weber River watershed, turned into and comingled with the waters of Provo River, shall bear each its respective loss by evaporation and seepage and shall bear each its respective proportion of the cost of distribution and administration of the orders of the Court and the Decree herein, and;

"The final determination and fixing of the quantity of water that should be deducted for loss in transmission of the stored waters, the Ontario Drain Tunnel waters, and the waters diverted from the Weber River watershed, turned into and comingled with the waters of the Provo River, is postponed until such time as observations and measurements will enable the Court to fix the same with reasonable certainty. The Court will therefore retain jurisdiction of this case for that purpose and at some future time, upon application of any party interested therein, will hear such evidence as may be available, and determine the amount of loss in transmission of such water. Pending such hearing and determination there may be deducted from the stored waters, four per cent of their volume, for loss by evaporation and seepage.

"That the Commissioner shall determine, when practicable, the quantity of loss by evaporation and seepage, of the waters in this paragraph referred to."

It is also provided in said Decree in paragraph 118 thereof, as follows:-

"It is further ordered, adjudged and decree, that excepting storage waters, Ontario Drain Tunnel waters, waters diverted from the Weber River watershed, the waters used for the generation of power in the Wasatch Division, and denominated "Wasatch Division Power Rights", the waters used for the generation of power in the Provo Division by the Utah Power & Light Company, the waters of the Midway Waterworks Company, and the waters for domestic and municipal uses of Provo City as set out in subdivision (e) paragraph 4; whenever the quantity of water is insufficient to supply a class, then the persons and parties entitled thereto shall have the same distributed to them pro rata according to the quantities to which they are entitled in said class.

6. That the final decree in said cause was made and entered on the 2nd day of May, 1921, and has not been appealed from or modified, and is now, and has been at all times herein mentioned, in full force and effect; that no application has been made to the Court by any party to this action, pursuant to the provisions of paragraph 117 of said decree, for a hearing to determine the amount of loss in transmission of the storage waters and other waters, mentioned in said paragraph, and that the Court has not of its own motion held such a hearing, and that the provisions of said paragraph providing, "Pending such hearing and determination there may be deducted from the stored waters, four percent of their volume, for loss by evaporation and seepage"; are still in full force and effect, and said Commissioner heretofore has acted in accordance with said provisions.

7. That by reason of the provisions of paragraphs 117 and 118 and other provisions of said Decree as aforesaid, it was at all times herein mentioned and now is the duty of said Water Commissioner to permit the said storage waters of petitioner to be released from petitioner's reservoirs at the head of said Provo River, during the irrigation season of each and every year, into the channel of said Provo River, and there be comingled with the natural flow of said River, and be conducted along the channel of said River to the power dam of the Utah Power & Light Company, located in Provo Canyon a short distance up stream from the point on said river known as the Heiselt Dam, where petitioner's canal diverts from the natural channel of said River; that it is the further duty of said Water Commissioner under said Decree, when sufficient of said comingled waters have reached the said Utah Power & Light Company's dam, to by pass over or around said dam for the use of petitioner, and to be diverted into its canal at said Heiselt Dam, the same volume of water released by petitioner from its storage reservoirs at the head of said River, into said River and comingled with the natural flow thereof, less four percent by volume, for loss by evaporation and seepage, in transmission of said water as a part of the comingled stream.

8. That beginning ~~on~~ about the 4th day of July, 1935, the petitioner as successor in interest of plaintiff herein, has been continuously and ever since said date, and now is releasing from its storage reservoirs at the head of said river, its stored water awarded in said Decree, into the channel of Provo River, and there comingling it with the natural flow of said stream for the purpose of transmitting it as a part of said stream along said river to the point where it is to be diverted into petitioner's canal as aforesaid; that the volume of water so released and comingled, has varied in amount from 20 second feet to 60 second feet.

9. That beginning with the 5th day of July, 1935, there has been continuously, and now is sufficient flow of said comingled stream of water as aforesaid, at the said power dam on Provo River, to supply petitioner the same volume of water it has been and now is releasing of its storage waters into and comingling with the natural flow of said river, less four percent for loss in transmission due to seepage and evaporation.

10. That notwithstanding there has been and now is a sufficient flow of said comingled waters as aforesaid at the said power dam, to supply petitioner according to its rights as set forth heretofore, the said Commissioner has continuously deducted, and now is deducting from the volume of water petitioner is entitled to at said power dam, more than four percent to make up for losses by evaporation and seepage in the transmission of said waters as a part of the comingled stream; that said deductions vary in volume from 5 to 40 percent, and at all times herein mentioned have exceeded the four percent deduction allowed for by said Decree; that said Commissioner threatens to continue to deduct more than four percent for losses by evaporation and seepage of the volume of water released into and comingled with the waters of said River by petitioner as aforesaid.

11. That your petitioner is informed and believes, and therefore alleges on information and belief, that said Water Commissioner claims that it is his duty and that he has been authorized by said Decree, to deduct from said storage waters released into and comingled with the natural flow of said River, for loss by evaporation and seep-

age in transmission of said waters to the point where they are to be diverted to petitioner, whatever percent by volume of said waters released as aforesaid, as he shall determine and find in his judgment to be the amount of loss by seepage and evaporation, without further order or direction of the Court, and without a hearing by said Court to make a final determination of such loss; and that he claims and asserts that he has made the deductions of more than four percent by volume of said stored waters belonging to petitioner as alleged herein, in accordance with his interpretation of said Decree as aforesaid.

*Answer
must state*

12. That petitioner is informed and believes, and on that ground alleges, that the said Commissioner bases his claim that he has the right and duty to deduct from time to time whatever percent by volume he determines in his judgment to be the loss due to evaporation and seepage in the transmission of said waters from the amount released by petitioner and comingled with the natural flow of said River, irrespective of whether it is four percent or more, and bases his action and conduct as alleged herein, upon the last sub-division of paragraph 117 of said Decree, which is: "That the Commissioner shall determine when practicable the quantity of loss by evaporation and seepage of the waters in this paragraph referred to".

That the record of the trial in this cause shows that there was an agreement between the Court and the various parties to the action represented by Counsel, and an understanding that the said sub-division of said paragraph 117 should mean in effect that the Commissioner shall determine when practicable the quantity of loss by evaporation and seepage of water in this paragraph referred to, and report to the Court the result of his investigation and determination, and that the said report and findings, in connection with other matters, should be used by the Court at such hearing as provided for in said Paragraph 117, in aiding the Court in making a final determination of this matter.

That the claims and conduct of the said Commissioner in administering the said decree as aforesaid, are contrary to and in

violation of the explicit provisions of said decree as hereinbefore specifically set forth. That until a hearing and final determination by the Court shall be had upon said matter, as provided in paragraph 117 of said Decree as aforesaid, the Commissioner is obligated to deduct not more than four percent in volume of the amount of said storage water turned into said River and comingled with the waters thereof by the plaintiff, and that unless the Court orders said Commissioner to follow the specific provisions of said paragraph 117 as set forth herein relating to deduction of four percent by volume of said storage water, that said Commissioner will continue to deduct more than the said four percent in violation of the rights of said petitioner and to the great and irreparable damage of the petitioner and its stockholders.

13. That during the period of time herein alleged, petitioner and its stockholders have been deprived by the unlawful and arbitrary action of said Commissioner, as herein alleged, of approximately 800 acre feet of its storage waters to which it was entitled under the terms of said decree.

14. That stockholders of your petitioner corporation who are entitled to the distribution of the waters owned by petitioner, including said storage waters, are in the midst of an irrigation and growing season on their said farms, and that any interference with their right to the use of said waters in the volume as provided for in said Decree, is greatly to their damage; that at the present time their water supplies are not nearly sufficient to water the lands of said stockholders, and that the conduct of said Water Commissioner in depleting said storage waters by deducting more than he is permitted to deduct therefrom for seepage and evaporation is causing great loss and damage to the stockholders of your petitioner; that said damage, in the total amount thereof, is difficult to estimate; that there is at the present time an accute water shortage for irrigation purposes; that any delay in having said Water Commissioner comply with the terms of said decree will greatly damage petitioner and its stockholders; that petitioner is entitled to have the time shortened

in which said Commissioner shall be required to appear and show cause why he should not comply fully with the terms of said Decree relative to the transmission of said storage waters.

WHEREFORE, your petitioner prays that said Water Commissioner, T. F. Wentz, be ordered to appear before this Court at such time as the Court may appoint, and that at such time the said Commissioner, T. F. Wentz, be required to show cause why he should not immediately comply with the terms of said Decree relative to the transmission of said storage waters of your petitioner, and that specifically he be ordered and directed to by pass and divert over and around the dam of the Utah Power & Light Company in Provo Canyon, the total volume of storage water which petitioner releases into and comingles with the waters of Provo River from its storage reservoirs, less a deduction of four percent for loss by evaporation and seepage, in the transmission of said waters from said storage reservoirs to said power dam. That said Commissioner be so ordered and that said order shall remain in full force and effect until such time as the Court will make a final determination of the loss by evaporation and seepage of storage waters, as provided for in paragraph 117 of said decree, and for such other and further order and relief as to the Court may seem just and equitable and necessary in the premises.

PROVO RESERVOIR WATER USERS COMPANY

By

R. J. Murdock
Petitioner

A. L. Booth
A. W. Walker
Attorneys for Petitioner.

STATE OF UTAH }
COUNTY OF UTAH } ss.

R. J. Murdock, being first duly sworn, deposes and says: That he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters that he believes the same to be true; that he is an officer of the petitioning corporation, to-wit: Secretary and Treasurer, and that this verification is made for and in behalf of said petitioner.

NOTARY PUBLIC
My Commission Expires
April 20, 1939.

R. J. Murdock
Alfred R. Booth
Notary Public, Residing at Provo, Utah.